72-311

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-311

WALTER SPEED, JR.,

Petitioner,

vs.

PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

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PEOPLE OF THE STATE OF ILLINOIS,

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PETITION FOR A WRIT OF CERTIORARI TO THE ILLINOIS SUPREME COURT.

Petitioner prays that a writ of certiorari be issued to review the judgment of the Illinois Supreme Court entered in this cause on May 22, 1972.

OPINION BELOW.

The opinion of the Illinois Supreme Court has not been reported as yet but is reprinted herein as Appendix A, *infra.*

JURISDICTION.

The judgment of the Illinois Supreme Court was entered on May 22, 1972. This petition is filed within 90 days of the final order of the Illinois Supreme Court. The jurisdiction of this court is invoked under 22 U. S. C. 1257.

QUESTIONS PRESENTED.

1. May the trial court deny the defendant a Motion to Suppress Physical Evidence which is to be used to rebut certain testimony of the defendant on an issue first brought up by the prosecutor's cross-examination?

2. Was the defendant denied equal protection of law when the court refused to grant him a timely motion to suppress physical evidence which was to be used to rebut testimony brought out by the prosecutor on cross-examination?

3. Were the Constitutional rights of the defendant violated by the submission of a voluntary manslaughter verdict over his objection in a trial where the sole charge was murder?

STATUTES INVOLVED.

Chapter 38, Section 114-12 Illinois Revised Statutes 1969 states in pertinent part as follows:

> (b) ". . . if the motion is granted (motion to suppress physical evidence) the property shall be restored . . . and it shall not be admissible in evidence against the movant at any trial . . ."
>
> Sub-paragraph (c) states in pertinent part, "The motion shall be made before trial unless opportunity, therefore, would not exist or the defendant was not aware of the grounds for the motion."

CONSTITUTION PROVISIONS INVOLVED.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

United States Constitution, Amendment IV.

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law; nor to deny any person within its jurisdiction the equal protection of the law."

United States Constitution, Amendment XIV.

STATEMENT OF FACTS.

The Petitioner, Walter Speed, Junior, was indicted for the offense of murder. Prior to trial he requested that the State inform him whether a manslaughter verdict would be sought by the State. That request was denied. The defense at the trial was that of self-defense, wherein the defendant stated he thought the deceased was going to inflict great bodily harm upon him and he therefore struck the deceased with a gun causing the gun to discharge and fatally injuring the deceased.

At the conclusion of all of the evidence, the State, over the objection of the defendant, submitted an instruction to the jury and a verdict for the jury's consideration on the issue of voluntary manslaughter. Although the court overruled the defendant's objection nonetheless the State still argued to the jury that they had proved their case of murder. Based upon this inconsistent position, the defendant moved that the manslaughter verdict be withdrawn. That motion was overruled.

The defendant was convicted of the offense of voluntary manslaughter and was sentenced to the Illinois State Penitentiary.

Prior to trial defendant moved the State to furnish him with a list of the physical evidence which the prosecution was going to use during the course of the trial. The State answered by saying that there was certain male

clothing that was to be used. On cross-examination of the defendant the prosecutor asked if it was not a fact that after the shooting the defendant went home, packed his luggage and had certain luggage in his car when arrested. The defendant replied that he did not. In rebuttal the arresting officer was put on the stand by the State to testify that he found certain luggage in the trunk of the defendant's car.

Immediately, defense counsel objected and requested a hearing on a motion to suppress physical evidence on the grounds that they were unlawfully seized. Earlier policemen had testified that they took the defendant out of his parked automobile and put him in the squad car and there was, therefore, a serious question of the validity of the search and seizure. The trial court denied the defendant an opportunity to have a hearing on a motion to suppress evidence on the grounds that the evidence was to be used as rebuttal testimony. The officer was allowed to testify that he found certain luggage but no testimony was brought forth that that luggage was packed or how long it had been there.

ARGUMENT.

I.

The Trial Court, by Erroneously Allowing the State to Introduce Illegally Seized Evidence Under the Guise of Cross-Examination and Depriving the Petitioner of an Evidentiary Hearing, Violated Petitioner's Rights Under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States.

Prior to trial, the defendant moved the State to furnish him with a list of physical evidence which the State intended to use in the course of the trial. The Motion was granted and the State answered that they would use certain articles of male clothing. Nowhere on the list of physical evidence was there any mention made of certain luggage which was allegedly recovered from the trunk of the automobile petitioner was occupying at the time of his arrest. Being completely unaware of the existence of such evidence, petitioner had no opportunity to investigate either the manner of seizure of such evidence or its reliability, nor was he able to consider its existence in making his decision to testify in his own behalf.

On cross-examination of the defendant, and for the first time in the trial, the Assistant State's Attorney asked him if he had gone home after the shooting and packed his bags. The defendant stated he did not pack anything. In rebuttal the State called a detective who testified that at the time the defendant was arrested on March 8, 1969 said detective had occasioned the search of defendant's automobile.

Immediately, the defendant objected to any testimony about what the detective found in his search of the car

and requested a hearing on a motion to suppress pursuant to Illinois law. The defendant's attorney told the court pursuant to the answer he received to his pre-trial discovery motion, he was unaware that the State would introduce any evidence obtained as a result of a search. The Court ruled that as this was rebuttal, the question of illegality of the search was not before the Court. The detective then went on to testify that he opened the trunk of the defendant's car and observed four to six pieces of luggage.

The rebuttal testimony regarding luggage found in the trunk of defendant's automobile was first brought into the case by the prosecution in its cross-examination of the defendant. The Assistant State's Attorney specifically asked the defendant whether he had a can of beer or five pieces of luggage in the car. No mention was made of luggage by the defendant in his direct testimony. Furthermore, the prosecutor asked the defendant on cross-examination:

> "Q. Isn't it also a fact, Mr. Speed, that between the time you left the station and got rid of the gun you went home and packed your bags?
> A. No, I did not pack anything."

The rebuttal testimony by the detective was that he and his partner approached the car with their guns drawn and took the defendant from the car, searched the trunk and found four to six pieces of luggage. This was an attempt to rebut an answer given by the defendant in response to a question that arose for the first time on cross-examination by the prosecution. Furthermore, such rebuttal does not prove that the defendant packed the luggage after the shooting as intimated by the prosecutor's question or that the luggage was even packed. In reality, although operating under the facade of cross-examination and an attempt to impeach the defendant, the true objective of the State's introducing evidence of the luggage was to have the jury infer the following:

1. That the defendant packed the luggage after he allegedly committed the crime charged.

2. That the defendant did so in an attempt to flee the jurisdiction.

3. That the attempt to flee the jurisdiction was an admission of guilt.

In *Agnello* v. *United States*, 269 U. S. 20, 70 L. Ed. 145 (1925) this court held that where evidence is the fruit of an illegal search, the government cannot on its own initiative ask a question beyond the scope of the direct testimony of the defendant, where the purpose of the question is to elicit a perjurious answer so that the illegally seized evidence may be used as rebuttal and thereby be placed before the trier of the fact. This decision resulted in the suppression of evidence which, had it been submitted to the jury, would have required no inference to prove the fact to which it related with respect to the testimony sought to be rebutted.

This court said:

> "And the contention that the evidence of the search and seizure was admissible in rebuttal is without merit. In his direct examination, Agnello was not asked and did not testify concerning the can of cocaine. On cross-examination, in answer to a question permitted over his objection, he said he had never seen it. He did nothing to waive his constitutional protection or to justify cross-examination in respect of the evidence claimed to have been obtained via the search." 269 U. S. 20, 35, 70 L. Ed. 145, 150.

Some twenty-nine years later, in *Walder* v. *U. S.*, 347 U. S. 62, 93 L. Ed. 503 (1954) this court held that the decision in *Weeks* v. *U. S.*, 232 U. S. 383, 58 L. Ed. 652, does not apply where the defendant, on direct examination by his attorney, makes a sweeping denial which, if allowed

to go uncontradicted, would result in perjurious testimony being submitted to the trier of fact in an uncontroverted status. In a memorable and oft quoted passage by Justice Frankfurter in that decision, the rationale was succinctly stated as follows:

> "It is one thing to say that the government cannot make an affirmative use of evidence unlawfully obtained. It is quite another thing to say that the Defendant can turn the illegal method by which evidence in the government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks Doctrine would be a perversion of the fourth amendment." 347 U. S. 62, 65, 98 L. Ed. 503, 507.

Walder however did not override *Agnello.*

While in *Agnello,* the government asked the defendant if he had received narcotics, in *Walder* the defendant stated on direct that he "had never sold narcotics in his life.", and reiterated the same assertion on cross-examination. It was only then that the government was enabled to use the fruits of the illegal search and seizure. Note also that in *Walder,* as in *Agnello,* the trier of fact was not required to infer the fact which was sought to be *proved* by the evidence admitted.

Perhaps one of the most important aspects of this court's decision in *Walder* is that it held that *Silverthorne Lumber Company* v. *U. S.,* 251 U. S. 385, 64 L. Ed. 319, was still viable in that the prosecution could not make indirect use of the fruits of the violation of a constitutional right for the purpose of proving its case in chief. The result is that when the government attempts to introduce said fruits as rebuttal, it must be done in good faith, and the testimony sought to be impeached cannot be created by the government itself, but must have been affirmatively asserted by the defendant on direct examination.

The decision in *Walder* expressly contrasted and thereby preserved the ruling in *Agnello* by stating that in the latter the government tried to "smuggle in" the illegally seized evidence by asking a broad question which was calculated to elicit a denial, thereby enabling it to introduce evidence of narcotics located in the defendant's home which would otherwise be inadmissible to prove the crime charged. It pointed out the fact that in *Agnello*, the defendant did not testify on direct of the fact which the government sought to rebut. That is precisely the factual situation in the case which is now before the Court.

In the instant case, the defendant did not testify to any fact relating to the luggage or packaging bags while under direct examination. It therefore required that the prosecution resort to subterfuge and trickery so as to obviate an objection to the relevancy of said evidence which surely would have come but for the guile of the prosecutor. Had he not resorted to the same type of questioning as was present in *Agnello*, the prosecutor could not have set the proper foundation for the introduction of the testimony of the detective.

It is therefore apparent that the implications of Justice Frankfurter's statement, *supra*, and the considerations that led to the decision in *Walder* are not present in the instant case. That decision was based on a factual situation which contained four crucial elements:

1. The evidennce in *Walder* had been illegally obtained;

2. The Government was not using it to prove the claim charged, but to rebut the testimony of the defendant (*i.e.*, collateral impeachment);

3. The defendant opened the door to the use of illegally seized evidence by telling an untruth on direct examination;

4. The entry of the illegally seized evidence was absolutely necessary to enable the trier of the fact to distill all of the evidence placed in *by the defendant.*

This Court needs little reminder that the decisions in *Mapp* v. *Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, *Escobedo* v. *Illinois,* 378 U. S. 478, 12 L. Ed. 2d 977, and *Miranda* v. *Arizona,* 384 U. S. 436, 16 L. Ed. 2d 694 extended the exclusionary rule of *Weeks* to the states via the Fourteenth Amendment. The policy elucidated by these decisions is the deterrence of improper police conduct and the preservation of judicial integrity. In *Harris* v. *New York,* 401 U. S. 222, 28 L. Ed. 2d 1 (1971) this Court applied the *Walder* exception to the exclusionary rule, until then applicable only in the Federal Court system, as an exception to the doctrines developed by *Mapp, Escobedo* and *Miranda.* It is the position of the petitioner that the facts of his case require the same distinction from *Harris* as *Agnello* does from *Walder.*

In *Harris,* this Court recognized the deterrence rational of *Escobedo* and *Miranda* and found that it remained viable and unaffected under the facts in *Harris.* In that case, the defendant had made statements to the arresting officers which were later found to be excludible at the trial because they had been obtained through a technical violation of a constitutional right which was elucidated in *Miranda.* Operating under the belief that these statements could not be used in any manner by the prosecution, the defendant *Harris* took the stand on his own behalf and on direct examination introduced his own testimony which was directly contradictory to the statements which had been suppressed. The prosecutor then introduced these otherwise inadmissible statements for the purposes of directly impeaching the defendant's testimony. This Court stated in its decision that such use of the statements was not

violative of *Miranda* and was akin to the use allowed in the Federal Court system under the rule of *Walder*. The Court stated:

> "The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances. We hold, therefore, that petitioner's credibility was appropriately impeached by use of his earlier conflicting statements." 401 U. S. 222, 226, 28 L. Ed. 2d 1, 5.

It must be recognized, however, that by changing the facts to allow the prosecution to first raise an issue, whether direct or collateral, on cross-examination, and then to rebut it with otherwise inadmissible and highly prejudicial evidence, would prevent every defendant from taking the stand and would destroy the deterrent effect of the *Miranda* and *Escobedo* decisions.

Where the Government attempts to circumstantially prove its case in chief by disguising otherwise inadmissible evidence as rebuttal, as it attempted to do under the facts of the case now before the Court, it has prostituted the rationales of *Walder* and *Harris*, and has run rough-shod over the principles of fairness developed in *Escobedo* and *Miranda*. It has taken the position of profiting from its own wrong doing to the unquestionable prejudice of the defendant.

This Court must look not only to the distinctions of fact which, standing alone, would distinguish the instant case from *Walder* and *Harris*, but must also look to the distinctions as to the nature and character of the evidence sought to be excluded and to the fact that the policy of denying protection of perjurious testimony is not called into question by the case now before the Court.

If the Court reverses the *Agnello* decision, or does not apply it with respect to *Harris* as it does to *Walder*, then

this will put an end to the deterrent effect to the exclusionary rules of *Weeks* and *Mapp*, because a police officer will know that by violating the accused's Fourth and Fifth Amendment rights he can place him on the horns of a constitutional dilemma with regard to his decision of exercising his right to testify on his own behalf. Such an application will destroy the defendant's ability to contradict the State's evidence by his own testimony.

Furthermore, where a defendant has not perjured himself on a relevant fact on direct examination, or has not opened a collateral area with perjurious testimony on direct, he has not attempted to use the Government's conduct as a license to perjure himself. To allow the Government a license to elicit perjury on cross-examination will defeat the same objectives of deterring police misconduct and preserving judicial integrity which the exclusionary rules were designed to facilitate and which *Walder* and *Harris* have capably attempted to preserve.

II.

In a Murder Prosecution, Submitting the State's Verdict and Jury Instruction on Voluntary Manslaughter Over the Objection of the Defendant, Was a Violation of the Defendant's Rights to Notice and Opportunity to Defend Under the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States.

The petitioner herein was indicted solely for the offense of murder and prior to trial moved that the State be ordered to inform him whether a manslaughter verdict would be sought, notwithstanding the fact that no separate indictment had been brought for manslaughter. This motion was denied by the trial court. At the conclusion of the case the State did in fact submit a manslaughter verdict and instruction over the objection of the defendant. The State, in its

summation to the jury, stated that it had proved its case of murder beyond a reasonable doubt and was asking for a finding of guilty based on that fact. The defendant, at the conclusion of the prosecutor's summation, moved the Court to withdraw the instruction and verdict on voluntary manslaughter based on the State's inconsistent position. Again this motion was denied. The Assistant State's Attorney stated in his rebuttal argument:

> "I feel that based on this evidence the defendant Walter Speed, is guilty. Guilty of murder."

At the conclusion of that argument the defendant again moved to withdraw the manslaughter instructions because of the inconsistent position of the State in submitting a manslaughter verdict but arguing a murder theory to the jury. Once again the motion was denied. The petitioner was found guilty of the offense of voluntary manslaughter which is the basis of this and was sentenced to the penitentiary for 4 to 8 years.

This Court held in *Cole* v. *Arkansas*, 333 U. S. 196, 68 Supreme Court 514, 19 L. Ed. 644:

> "No principle of procedural due process is more clearly established than that notice of the specific charge and a chance to be heard and a trial of the issues raised by that charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all Courts, State or Federal."

This Court further ruled in protecting the rights of minors:

> "Notice, to comply with due process requirements, must be given sufficiently in advance of scheduled Court proceedings so that a reasonable opportunity to prepare will be afforded and it must set forth the alleged conduct with particularity." *In Re Gault*, 387 U. S. 1, 87 Supreme Court 28, 18 L. Ed. 2d 527.

In the case that is now before the Court there was no notice to the defendant that the issue of voluntary manslaughter would be presented to the jury. The defendant was notified, by way of indictment, that he was charged with the offense of murder and based upon that charge he prepared his defense. It was not until after both sides had rested their cases and the proof was closed that Walter Speed was told for the first time that he would also have to defend against the offense of voluntary manslaughter. This conduct by the State and by the trial Court could do nothing but make shambles of the defendant's constitutional right to notice and an opportunity to defend. New issues were presented in submission of the voluntary manslaughter instruction, for that section of the Illinois Revised Statutes requires proof that the defendant intended to kill the deceased but that he believed unreasonably that facts existed which would have justified the killing.[1]

> "A person who intentionally or knowingly kills an individual commits voluntary manslaughter if at the time of the killing he believes the circumstances to be such that, if they existed, would justify or exonerate the killing . . . but his belief is unreasonable".

In not having these issues in mind when he presented his defense or cross-examining State witnesses the defendant of course did not meet those issues.

It is not the argument of this petitioner that voluntary manslaughter is not an included offense in a charge of murder. However, if the evidence of voluntary manslaughter which the State contends was present in the trial was adduced during the State's case in chief then the State has a duty, consistent with due process requirements and fairness, to at least inform the defendant prior to the reception of the defense case that a voluntary manslaughter

1. Illinois Revised Statutes, Chpt. 38, Section 9-2(b).

verdict will be sought. While this is in no way a substitute for pretrial notice of the charges it is nonetheless some notice prior to the presentation of the defense to the jury and enables the defendant to meet the issue by way of evidence. No defendant under a constitution which guarantees due process of law, should be placed in a position where he is for the first time notified of a new offense just prior to the closing argument and his fate must therefore rest not upon proof but upon the eloquence of his counsel in argument to the jury to rebut such a charge. This does not allow for effective assistance of counsel.

The petitioner submits that as a defendant may always waive his rights to an indictment and waive his rights to notice that he may on his own submit a verdict and instruction on voluntary manslaughter if he feels the evidence so warrants. But it is further submitted that there has erroneously evolved a body of law from that principle which says that the State may submit a verdict of the lesser included offense over the objection of the defendant if the evidence so warrants. The result of such a principle is that the State is able to use the defendant's own words to convict him. It places the defendant in a perilous situation whereby he must elect not to testify and risk a verdict of guilty of murder or to testify as to the facts surrounding his defense of his person and thereby risk a lesser included verdict being submitted over his objection. He thereby becomes his own prosecutor and his own grand jury by electing to testify.

It is for this reason that the State must elect whether it intends to proceed by way of a lesser included offense at some point in the proceeding prior to trial or to the presentation of the defense. In *Malloy* v. *Hogan*, 378 U. S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), the case in which this Court held that the fifth amendment privilege against self-incrimination applies to the State, this Court said;

> "The fourteenth amendment secures against State invasion of the same privilege that the fifth amendment guarantees against Federal infringement—the right of a person to remain silent unless he chooses to speak in an unfettered exercise of his own will and to suffer no penalty, * * *, for such silence."

The defendant here indeed suffered a penalty for his testimony and would have possibly suffered a penalty by his silence. No defendant should be punished because of his truthful testimony in refuting the charges then facing him.

This petitioner respectfully urges this Court to adopt the ruling of the District Court of Appeals of Florida, in *Washington* v. *State,* 247 So. 2d 743, which held that an instruction on a lesser included offense should not have been given to the jury where the defendant charged objected to such instruction. The Court held:

> ". . . charges (to the jury) upon lesser included offenses are for the benefit of the defendant, and being such, are subject to being waived by him, if instructions as to such offenses are not requested by the defendant. It necessarily follows, that if such instructions can be waived, they are not mandatory. Seemingly, the rule actually is that when the defendant requests instructions on lesser included offenses, the trial judge has a mandatory duty to give such instructions. The duty to instruct is coextensive with the defendant's request." 247 So. 2d 743 at 745.

The court further states:

> "a review of the authority cited and from the fundamental principles of due process leads us to the conclusion that since instructions as to lesser included offenses can be waived by the defendant, that he may, upon timely objection, insist that he be tried by the charges set out in the charged instrument." 247 So. 2d 743 at 747.

By following the incontrovertible logic of the Florida court, this Court can put an end to the shoddy practice of prosecutors trying to salvage a dying case by the submission of a lesser included offense verdict over objection of the defendant.

CONCLUSION.

For the above and foregoing reasons, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

Docket No. 43815—Agenda 9—March, 1972.

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, v. WALTER SPEED, JR., Appellant.

MR. JUSTICE DAVIS delivered the opinion of the court:

The defendant, Walter Speed, Jr., was indicted in the circuit court of Cook County for the offense of murder. The State offered and the court submitted a voluntary manslaughter verdict to the jury, over the objection of the defendant. The jury returned a verdict finding the defendant guilty of voluntary manslaughter, and he was sentenced to a term of from four to eight years in the Illinois State Penitentiary.

The defendant was accused of unlawfully shooting and killing Harrison Jackson in an automobile service station operated by Jackson in the city of Chicago. Two brothers were the only occurrence witnesses who testified for the State. Sam Cannon, one of the witnesses, testified that he had been working on a car at the service station when a dice game began at about 2:00 P.M.; that four or five men, including Jackson, the defendant, and the witness, participated in the game; and that Jackson was losing money and the defendant and the witness were winning when Jackson left the game at about 7:00 P.M. to take a lady home.

The witness further testified that when Jackson returned, the game continued, and Jackson began winning the defendant's money; that the defendant then left the game, but returned shortly with more money; that, as Jackson continued to win the defendant's money, an argument began

over $10 which Jackson picked up but which the defendant claimed was rightfully his; and that when the defendant asked for the money, Jackson said he didn't owe the defendant $10, refused to give it to him, and an argument ensued; that the defendant went to his car and returned with a gun in his hand; that he again asked Jackson for the $10 and Jackson then dropped some money to the floor; and that after picking it up, the defendant then fired the gun, and Jackson fell near the wall. Then, according to the witness, the defendant struck Jackson with the gun, causing it to fire a second time, and then went through Jackson's pockets and took the balance of the money. On cross-examination, the witness stated that Jackson had been drinking that day and had $160 in his pocket prior to the shooting, but had no money in his possession at the hospital, according to information given there.

The other occurrence witness, Julius Cannon, testified that only one shot was fired; that Jackson had something which appeared to be a wrench in his left hand when the defendant came in the doorway with the gun; that Jackson appeared to threaten the defendant with this instrument; that the defendant pushed Jackson before shooting him; and that after Jackson fell to the floor, the defendant left the building without touching him again.

A pathologist testified that the cause of Jackson's death was a bullet wound through the heart, and that, in addition, there was a two-inch laceration on the back of his neck. He further testified that the alcoholic content in Jackson's blood indicated that he was moderately intoxicated at the time of his death.

Detective James Griffin testified that, without resistance, he arrested the defendant near his home and made an immediate search of his automobile, including the trunk, where a .22 caliber revolver was found, and that he believed all

of the parties and witnesses to the dice game had been drinking.

The defendant testified on his own behalf and stated that he had obtained the gun as security from someone who owed him money; that he carried the gun with intent to return it and recover the money; that Jackson repeatedly refused to return $10 of the defendant's money which he had picked up, and told the defendant that the only thing he was going to get was a killing; that when the defendant started for the door, Jackson came at him with a wrench, and in order to ward off the blow, he pulled the gun out of his pocket, hit Jackson's hand and thus caused the gun to discharge; that the shooting was not intentional; and that he did not strike Jackson on the back of the head with the gun and did not take his money. He also stated that from the time of the shooting until his arrest, he made no attempt to leave the city of Chicago, and on cross-examination he denied that he went home and packed his luggage.

Detective Griffin, when called in rebuttal by the State, testified over objection by the defendant, that when he searched the defendant's car at the time of the arrest, several pieces of packed luggage were found in the trunk of the car. The defendant then made a request for a hearing on a motion to suppress this evidence, which was denied.

At the conference on instructions, the State tendered both a murder and voluntary manslaughter instruction, and the latter was given by the court over objection by the defendant.

The defendant raises five points in this appeal: that the submission of a voluntary manslaughter verdict to the jury at the conclusion of the case, absent a manslaughter count in the indictment, deprived him of his constitutional right to notice of the charges against him; that certain comments of the trial court deprived him of a fair trial; that the court

erred in denying him a hearing on the question of the legality of the search of his car; that he was prejudiced by a misleading argument of the prosecutor; and that the evidence sustained neither the giving of a manslaughter instruction nor the conviction.

The identical question of whether a person indicted only for murder may, absent a specific manslaughter charge in the indictment, be convicted of manslaughter, was raised in *People* v. *Lewis* (1941), 375 Ill. 330. In that case, it was argued that the two offenses differ essentially in that murder requires proof of malice, whereas manslaughter does not, and that, therefore, the defendant was convicted of an offense with which he was not charged, in violation of due process of the law under the State and Federal constitutions. In rejecting the argument, this court at page 335 stated: "Since it is the general rule that an indictment for murder involves all other grades of homicide which the evidence tends to establish, an indictment charging murder includes therein a charge of manslaughter. [Citations.] Consistently with this reasoning we have expressly held that the crime of manslaughter is embraced in a charge of murder, and the accused may be found not guilty of murder and convicted of manslaughter. [Citations.] Since the indictment must be held to charge manslaughter, plaintiff in error was thereby advised of the charge, and he has no ground to complain that his rights under the due process clause of the State or Federal constitutions have been invaded." Also see: *People* v. *Korycki* (1970), 45 Ill. 2d 87. Therefore, we find no merit in this contention.

The next contention is that the trial court, after overruling an objection of counsel for the defendant, made the following prejudicial remark to counsel: "You don't need to coach from your table." This comment was made during the stress of the trial and may have lacked the circum-

spection which should characterize the statements of the trial court. However, it did not constitute reversible error.

The defendant's claim that he was improperly denied a hearing on his motion to suppress evidence during rebuttal is likewise not well taken. He failed to object when the search of the trunk of his car was first mentioned in the State's case in chief. In addition, the rebuttal testimony was corroborative of the State's case in chief and was offered to contradict and impeach the testimony of the defendant. It was competent rebuttal evidence and it was properly received for impeachment purposes. (*People* v. *Bell* (1928), 328 Ill. 446, 451-452.) The State here did no more than utilize the truth-testing procedures of the adversary process, and the belated motion to suppress was properly denied.

In *Walder* v. *United States* (1954), 347 U. S. 62, 98 L. Ed. 503, 74 S. Ct. 354, there was a factual situation somewhat similar to that in the case at bar. Even though the rebuttal testimony of the police officer concerned evidence which had been illegally seized and suppressed, the United States Supreme Court at page 65 found that there was no fourth-amendment violation, and stated: "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment." (347 U. S. 62, 65.) Also see: *People* v. *Pelegri* (1968), 39 Ill. 2d 568, 575-577.

The defendant next urges that the prosecutor's closing argument to the jury was misleading and deprived him of a fair trial. The prosecutor said: "Did the defendant get on

the stand and say this was self-defense, I was protecting my life? This man was beating me bloody with a wrench in his hand? Absolutely not." The defendant objects to this comment because it seems to imply that the defendant had to be wounded, or blood drawn, before he had the right to kill in self-defense.

We acknowledge that a person is justified in the use of force against another when and to the extent that he reasonably believes that such conduct is necessary to defend himself against the other person's use of unlawful force, and that it is not necessary that blood be first drawn before the right of self-defense arises. However, we do not construe the prosecutor's remarks as misleading or reversible error, but in fact find them to be proper comment on testimony validly introduced during the trial. *People* v. *Anderson* (1971), 48 Ill. 2d 488, 497-498; *People* v. *Ostrand* (1966), 35 Ill. 2d 520, 531.

The defendant finally argues that the evidence sustained neither the giving of a manslaughter instruction nor the conviction. We disagree. Under the circumstances of this case, the defendant can be found guilty of the lesser included offense by a jury if the evidence supports such a finding.

There was sufficient evidence at the trial from which the jury could deduce that the defendant believed the circumstances to be such as, if they existed, would justify the killing under the principles of self-defense, but his belief was unreasonable. All witnesses agreed that the defendant left the dice game and went to his car just prior to the shooting, and one witness testified that when he returned Jackson appeared to threaten him with a wrench. We observed in *People* v. *Jordan* (1960), 18 Ill. 2d 489, at page 493; "However, when the evidence is conflicting it is the function of the jury to resolve the conflict and determine the credibility

of the various witnesses. (*People* v. *Sudduth*, 14 Ill. 2d 605.) We will not disturb the jury's finding that the defendant did not act in self-defense." Here also, we will not disturb the jury's finding.

For the foregoing reasons the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.